IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 572

METROPOLIS THEATRE COMPANY,
A NEW YORK CORPORATION,
Petitioner,

vs.

L. H. BARKHAUSEN AND RANDOLPH BOHRER,
ETC., ET AL.,
Respondents.

ANSWER TO PETITION FOR CERTIORARI AND BRIEF IN SUPPORT OF THE ANSWER.

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ANSWER TO PETITION FOR CERTIORARI.

PRELIMINARY STATEMENT.

Petitioner, a New York corporation, filed its complaint seeking equitable relief to forfeit a ground lease which has more than fifty years to run; to deprive the lessee of the ownership and possession of a building which lessee erected at a cost in excess of $2,900,000; to destroy a mortgage which secures leasehold bonds in excess of $2,000,000 and to nullify a valuable theatre lease having an unexpired term of eighteen years.

Jurisdiction of the Federal Court is based on diversity of citizenship. Petitioner is a New York corporation and

all of the respondents are citizens of Illinois, with the exception of Essaness Theatres Corporation, which is a Delaware corporation. Respondents contend that the Trustees of the Thompson estate (hereinafter referred to as the "Thompson Lessors" or "Thompson") are indispensable parties and, if joined, would be aligned on the side of the petitioners. Since the Thompson lessors are citizens of Illinois, the joinder of the Thompson lessors destroys the requisite for diversity of citizenship.

The opinion of the court below is based on the allegations of the complaint and the affidavits and exhibits filed in support of respondents' motion to dismiss. The trial court dismissed the complaint, and the Court of Appeals affirmed, on the grounds that the Thompson lessors are indispensable parties and, if joined, would be aligned as a party plaintiff and would destroy the diversity of citizenship, thereby requiring the dismissal of the suit for want of jurisdiction.

Answer to So-Called "Summary and Short Statement of the Matter Involved."

This case is one involving the appropriate application of Rule 19 of the Federal Rules of Civil Procedure. Has petitioner failed to join an indispensable party who, if joined, would destroy the diversity requisite for Federal jurisdiction? The lower courts determined that, under Rule 19, the absent party was indispensable (170 F. (2d) 481).

The petition for certiorari presents only one question, but is based upon two grounds. That question, which was not raised in either the District Court or the Court of Appeals, is whether joinder of party should be determined by state or federal law.

Petitioner's two grounds are:

1. First, an alleged conflict exists between the decision of the United States Court of Appeals for the Seventh Circuit "following its declaration in *DeKorwin* v. *First National Bank*, 156 F. (2d) 858 (1946) *cert. denied*, 329 U. S. 795, 67 S. Ct. 481, 91 L. Ed. 980 (1946) that

> 'indispensability must be determined by federal rather than local rules' "

and the decision of the Court of Appeals for the Fifth Circuit in *McComb* v. *McCormack*, 159 F. (2d) 219 (1947) (Petitioner's brief, Pages 2-4).

Nowhere in the opinion of the Court of Appeals in the instant case is there any statement that indispensability must be determined by federal rather than local rules. Nor is there anything in the opinion which indicates that the Court disregarded Illinois law. The Court of Appeals said in its opinion that:

> "Whether the Thompson lessors are indispensable parties must be determined from all the facts in the case, and the nature of the relief sought." (Tr. 207.)

The only question therefore is whether Thompson is an indispensable party within the purview of Rule 19 of the Federal Rules of Civil Procedure.

In a previous case to be sure, *DeKorwin* v. *First National Bank*, 156 F. (2d) 858 (1946), the Court of Appeals for the Seventh Circuit did hold that indispensability must be determined by federal rather than local rules. But no conflict exists between the decisions of the Seventh Circuit and the decisions of the Fifth Circuit. In fact the Court of Appeals for the Fifth Circuit in a case decided on February 20, 1948, after the *McComb* case, cited and relied upon the very Seventh Circuit case that petitioner claims created the conflict. In *Lawrence* v. *Sun Oil Co.* (C. C. A. 5,

1948), 166 F. (2d) 466, 469, the Court of Appeals for the Fifth Circuit said:

> "Procedure in the federal courts is governed by the Federal Rules and not by the local law. 17 Hughes, Federal Practice Jurisdiction & Procedure, § 18518. This is particularly true in diversity cases where the question of indispensability of absent parties arises. It is now settled we think that in such cases the rule as to indispensability of absent parties must be determined by federal rather than by local law. *DeKorwin* v. *First National Bank of Chicago*, 7 Cir., 156 F. 2d 858; *Chicago, M., St. P. & P. R. Co.* v. *Adams County, et al.*, 9 Cir., 72 F. 2d 816."

2. The second ground for certiorari raised by petitioner is that the Court of Appeals for the Seventh Circuit has so far departed from historical principles of joinder as to call for certiorari. Two arguments are made in support of this ground; first, that Illinois law, differing from the "Federal law" would not require the joinder of the Thompson trustees; and second, that, by requiring such joinder, the petitioner has been deprived of a valuable right.

Neither of these arguments is sound. In the first place, the Illinois rule is identical with the rule enunciated by the Court of Appeals for the Seventh Circuit in this case, and by this Court in *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 86 L. Ed. 47 (1941) to the effect that all persons possessing a substantial interest in the subject matter of the litigation and who will be affected by the decree must be made parties to the suit.

Texas Company v. *Hollingsworth*, 375 Ill. 536 (1941).

Oglesby v. *Springfield Marine Bank*, 385 Ill. 414 (1944).

Georgeoff v. *Spencer*, 400 Ill. 300 (1948).

Gaumer v. *Snedeker*, 330 Ill. 511 (1928).

Stripe v. *Yager*, 348 Ill. 362 (1932).

Secondly, the decision of the Court of Appeals for the Seventh Circuit has no effect on the substantive rights of the petitioner. It is not denied by the Court of Appeals that each of two lessors in the instant case has the legal right separately (a) to terminate the respective lease and (b) to re-enter his separate premises in the event of certain specified defaults. The only effect of the decision below is to require petitioner to enforce its rights in the state court. Petitioner's suit asks the court to decree that two leases have been forfeited or terminated. The only question is whether the Court of Appeals correctly refused to exercise its equitable powers in the absence of persons who have a vital interest in the controversy. The Circuit Court held that under the facts and circumstances of the case the Thompson lessors has such a vital interest in the controversy as to make them indispensable parties for the Court to hear and determine the controversy. In reaching this decision, the Court of Appeals followed the rulings of this Court.

Healy v. *Ratta*, 292 U. S. 263, 78 L. Ed. 1248 (1934).
Indianapolis v. *Chase National Bank*, 314 U. S. 63, 86 L. Ed. 47 (1941).
Niles-Bement-Pond Co. v. *Iron Moulders Union*, 254 U. S. 77, 65 L. Ed. 145 (1920).

All of petitioner's arguments based upon "importance" and "departure from historic principles of joinder" fall when it is recognized that petitioner has lost no *rights* by the decision herein. The Court of Appeals for the Seventh Circuit affirmed a decision of the District Court holding that a certain absent party was "indispensable", and, if joined properly, would destroy the diversity requisite for Federal jurisdiction. The petitioner is thus returned to the Courts of Illinois for the determination of an issue which is particularly appropriate for state court determina-

tion; *i. e.*, the existence of a right of forfeiture in a ground lessor under an Illinois lease agreement. At best, petitioner seeks to have this Court employ certiorari to force the Federal courts to consider a question of state law.

This case is definitely not of general importance. The Court of Appeals correctly applied the rules of joinder which have their roots in the common law, but, even if these rules had not been correctly applied to the facts of this particular case, the case does not thereby become generally important. The Court of Appeals did not announce a rule that the historic principles of joinder should be ignored. Instead, that Court correctly applied those principles to the facts of this case.

Statement of the Facts.

The only facts necessary to determine indispensability are set forth in the opinion of the Court of Appeals for the Seventh Circuit (Tr. 202-205, fn.). They are summarized hereinbelow at pages 12 to 15.

BRIEF IN SUPPORT OF ANSWER TO PETITION FOR CERTIORARI.

I.

There Is No Conflict Between the Decisions of the Court of Appeals for the Seventh Circuit and Those of the Court of Appeals for the Fifth Circuit. The Federal Courts Have Unanimously Held That Federal Law, Not State Law, Governs the Disposition of Procedural Questions Such as Indispensability of Parties.

(a) Nowhere in the opinion of the Court of Appeals in the instant case is there any statement that indispensability must be determined by federal rather than local rules. Nor is there anything in the opinion which indicates that the Court disregarded Illinois law. The Court of Appeals said in its opinion that:

> "Whether the Thompson lessors are indispensable parties must be determined from all the facts in the case, and the nature of the relief sought." (Tr. 207.)

The only question therefore is whether Thompson is an indispensable party within the purview of Rule 19 of the Federal Rules of Civil Procedure.

In a previous case to be sure, *DeKorwin* v. *First National Bank*, 156 F. (2d) 858 (1946), the Court of Appeals for the Seventh Circuit did hold that indispensability must be determined by federal rather than local rules.

(b) No conflict exists between the rule adopted by the Court of Appeals for the Seventh Circuit and that followed by the Court of Appeals for the Fifth Circuit, nor with respect to the teachings of this Court. Petitioner argues

that the instant case finds the Court of Appeals for the Seventh Circuit affirming its decision in *DeKorwin* v. *First National Bank,* 156 F. (2d) 858 (1946) *cert. denied* 329 U. S. 795, 67 S. Ct. 481, 91 L. Ed. 980 (1946), to the effect that indispensability of parties must be determined by federal rather than local rules. This is also the rule in the Fifth Circuit. *Lawrence* v. *Sun Oil Co.,* (C. C. A. 5, 1948), 166 F. (2d) 466, citing the *DeKorwin* case *with approval* at page 469. No more certain evidence of lack of conflict could be found than to have one Circuit cite and rely upon the very decision in the other Court alleged to create the conflict.

See also *Keegan* v. *Humble Oil & Refining Co.* (C. C. A. 5, 1946), 155 F. (2d) 971, and *Calcote* v. *Texas Pacific Coal & Oil Co.,* (C. C. A. 5, 1946), 157 F. (2d) 216 (*cert. denied* 329 U. S. 782, 67 S. Ct. 205, 91 L. Ed. 671 (1946)).

In *McComb* v. *McCormack,* (C. C. A. 5, 1947) 159 F. (2d) 219, the case which petitioner cites as in conflict with the rule in the Seventh Circuit, the Court did not consider what law controlled under Rule 19 as to indispensability, since it was not required to do so. When that Court was later required to face this precise issue, it unequivocally adopted the rule of the Seventh Circuit. The contention that a conflict exists is frivolous.

II.

The Decision of the Court of Appeals for the Seventh Circuit In No Way Affects the Rights of Petitioner.

(a) The outcome on the merits in the instant case is in no sense involved. Accordingly, the rights of the petitioner are in no way involved and *Erie R. R.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188 (1938); *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 85 L. Ed. 479 (1941); and *Guaranty Trust*

Co. v. *York,* 326 U. S. 99, 89 L. Ed. 2079 (1945), are not called into the ambit of this Court's decision.

Petitioner has confused the outcome of litigation with the rules of procedure which Federal courts have adopted to permit the orderly operation of a judicial system having powers concurrent with the state court system. In what manner or with whom one may sue is not in any manner identical with what the result of a suit may be. The fact that the Federal Court requires petitioner to join as a party the Thompson lessors, who it is asserted would not be indispensable in an identical action in the state courts, does not state a ground for certiorari. Petitioner has attacked not a *result,* but a rule of procedure, established by this Court pursuant to an Act of Congress. 48 Stat. 1064, 28 U. S. C. § 7236.

Petitioner's argument rests upon the assertion that petitioner had "the right to vindicate in the federal courts its rights *in rem* and *in personam*" (Petitioner's Brief, p. 22) and that the lower courts had a duty "to recognize that under the Illinois law petitioner's title was separate and to ascertain whether under Illinois law petitioner might therefore sue respondents without joinder of the Thompson trustees" (Petitioner's brief, p. 29). But petitioner did not have a *right* of any kind in the Federal Court unless that Court had jurisdiction. And it is perfectly obvious that federal jurisdiction will not be found wherever state jurisdiction exists. It is equally obvious that the answer to the procedural question presented by this case will not be made to depend upon state law simply because that answer has the effect of settling the question of federal jurisdiction.

Petitioner's contention is simply a statement that the federal courts must at all times act as triers of fact under questions of state law, and cannot adopt rules of procedure which have the effect of determining the limits of

the jurisdiction conferred by statute. That this is not the law is clear. Any adoption of such a rule would swamp the Federal Courts with business that intrinsically belongs to the state court, just such business as the instant case. See: *Healy* v. *Ratta*, 292 U. S. 263, 78 L. Ed. 148 (1934); *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 86 L. Ed. 47 (1941).

III.

The Decision of the Court of Appeals For the Seventh Circuit Is In Accordance With Historic Concepts of Joinder.

(a) In the exercise of its rule-making power this Court approved the promulgation of the Federal Rules of Civil Procedure. In applying those rules the Court has many times had occasion to concern itself with a definition of indispensable parties. The instant case is one decided upon Rule 19 of the Federal Rules of Civil Procedure.

Rule 19 is merely declaratory of the law as it existed before the adoption of the rule. Neither the Court of Appeals in the instant case, nor any other Federal Court, has ever indicated that this rule departed from "the historic principles of joinder." In *United States* v. *Washington Institute of Technology* (C. C. A. 3, 1943), 138 F. (2d) 25, 26, the Court stated:

> "Rule 19(a) of the Rules of Civil Procedure, 28 U. S. C. A., following section 723c requires that those having 'a joint interest shall be made parties * * *.' This means those who are indispensable parties prior to the rules. 2 Moore's Federal Practice (1938), Section 19.02."

See also:

> *Society of European Stage Authors & Composers* v. *W. C. A. U. Broadcasting Co.* (E. D. Pa. 1940), 1 F. R. D. 264, 266.

Wesson v. *Crain* (C. C. A. 8, 1948), 165 F. (2d) 6.
Shell Development Co. v. *Universal Oil Products Co.* (C. C. A. 3, 1946), 157 F. (2d) 421, 424.
Currier v. *Currier* (S. D. N. Y., 1941), 1 F. R. D. 683, 684.
Spanner v. *Brandt* (S. D. N. Y., 1941), 1 F. R. D. 555, 556.

(b) Indispensable parties are persons who have an interest in the controversy of such a nature that a final decree without them cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

The test of an indispensable party is well expressed in *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U. S. 77, 80, 65 L. Ed. 145, 147, (1920), wherein this Court stated:

> "There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not, but a rule early announced and often applied by this court is sharply applicable to the case at bar. In *Shields* v. *Barrow*, 17 How. 130, 139, 15 L. ed. 158, 160, this language quoted with approval in *Barney* v. *Baltimore*, 6 Wall. 280, 284, 18 L. ed. 825, 826, and again in *Waterman* v. *Canal-Louisiana Bank & T. Co.*, 215 U. S. 33, 48, 54 L. Ed. 80, 86, 30 Sup. Ct. Rep. 10, was used to describe parties so indispensable that a court of equity will not proceed to final decision without them, viz.:
>
> 'Person who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience'."

The rule so expressed has been followed by the Court of Appeals for the Seventh Circuit in *DeKorwin* v. *First*

National Bank (C. C. A. 7, 1946), 156 F. (2d) 858, *cert. denied* 329 U. S. 795, 67 S. Ct. 481, 91 L. Ed. 980 (1946). See also, *Montfort* v. *Korte* (C. C. A. 7, 1938), 100 F. (2d) 615, 617, *cert. denied* 306 U. S. 659, 59 S. Ct. 791, 83 L. Ed. 1056 (1939), wherein the Court said:

> "'After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?'"
>
> "It then determined that if all four questions could be answered in the affirmative with respect to the interest of the absent party, then such party is a necessary one. If any one of the four questions, however, is answered in the negative, then the absent party is indispensable."

To the same effect are

State of Washington v. *United States* (C. C. A. 9, 1936), 87 F. (2d) 421.

Baird v. *Peoples Bank & Trust Co.* (C. C. A. 3, 1941), 120 F. (2d) 1001.

Wesson v. *Crain* (C. C. A. 8, 1948), 165 F. (2d) 6.

Keegan v. *Humble Oil & Refining Co.* (C. C. A. 5, 1946), 155 F. (2d) 971, 973.

(c) The Thompson lessors are indispensable parties to this case.

Whether the Thompson lessors are indispensable parties must be determined from all the facts in the case.

A single 22-story office and theatre building has been erected on the adjoining properties of Metropolis and

Thompson by the lessee under the ground lease, pursuant to the provisions of both the Metropolis and Thompson leases, at a cost exceeding $2,,900,000. Both leases were executed concurrently, contain substantially the same provisions except for differences in the amount of rental, and run for a term of 77 years from May 1, 1924 to April 29, 2001 (Tr. 50-88, Ex. A; Tr. 151-156, Ex. Q). Reference to the Thompson lease is made in the Metropolis lease and vice versa.

In 1935 both leases were amended by a single document executed by petitioner, Thompson and the lessee (Tr. 89-95, Ex. B).

In 1939 the two leases were again amended by substantially similar agreements (Tr.. 95-111, Ex. C; Tr. 157-169, Ex. R). Though separate amendatory agreements were signed for each lease, each agreement expressly provided that it was being executed in consideration of the execution of the other agreement. The amendment to the Thompson lease is attached as an exhibit to the Metropolis amendment, and vice versa.

The Metropolis amendment contains the following recital (Tr. 97, Ex. C):

> "Whereas there has been erected upon the demised premises and on the Thompson premises by the original Lessee under each of said indentures of lease, pursuant to the permissive sections thereof, a twenty-two story building which is so constructed that it forms a complete structure located on the premises demised by both indentures of lease, and in the event of a default under either or both of said indentures of lease, neither part of said building could be operated separately from the other without the expenditure of considerable money by the owner or owners of the Lessor's interest under each of said leases."

A similar provision is contained in the Thompson amendment (Tr. 157, Ex. R).

Each agreement provides that operating expenses, repairs and maintenance of the building should be paid from the gross income of the building (Tr. 98-103, Ex. C; Tr. 159-163, Ex. R). The gross income attributable to the Metropolis tract is not to be used solely for repairs of that portion of the building situated on the Metropolis tract, nor is the gross income attributable to the Thompson tract to be used solely for the repair and maintenance of that portion of the building over the Thompson tract. There is no provision for division of gross income. The income from the building in its entirety is to be applied for the operation, repair and maintenance of the building as a single unit.

Each agreement allocates to the lessor a certain percentage of the net income from the entire property—that is, the parcels owned by Metropolis and Thompson taken as an entirety. The leases do not provide that Metropolis should receive the rent from Lots 5 and 6 owned by it, and Thompson the rent from Lot 7; but rather, each lessor receives a percentage of the aggregate net income of the building as a unit.

A default under the Thompson lease is expressly made a default under the Metropolis lease (Tr. 108, Ex. C, Sec. 8); and similarly a default under the Metropolis lease is considered a default under the Thompson lease (Tr. 166, Ex. R, Art. VI).

Accordingly, both lessors are interested in the maintenance of a common building leased to a common lessee. Both lessors are interested in a common fund—the income from the building as a single unit. Each has the right to have the gross income applied to the operation, repair and maintenance of the building as a single unit and to receive a percentage of the net income.

Furthermore, the theatre portion of the building is

located partly on the Metropolis tract and partly on the Thompson tract (see plat, Tr. 49). A single theatre sublease was executed for the entire theatre premises, and both the Metropolis tract and the Thompson tract are therein described (Tr. 123, Rec. 274, Ex. G, pp. 4, 5). A single rental is payable for the entire theatre premises (Tr. 123-124). Metropolis and Thompson each agreed to recognize the theatre sublease if the respective ground leases were terminated (Tr. 133, Ex. K; Tr. 169-170, Ex. S). In that event, Metropolis is to receive 66⅔ percent of the rental and Thompson 33⅓ percent. Upon the forfeiture of the ground leases, both Metropolis and Thompson succeed to the rights of the lessor under the theatre sublease. Both Metropolis and Thompson, therefore, have a common interest in a single rental, payable under one lease by a lessee occupying a theatre erected on both parcels. Metropolis and Thompson together have an interest in the performance by the theatre lessee of all its obligations under the lease.

If petitioner is successful in this litigation, the interests of the Thompson lessors are inevitably affected. By the respective leases and agreements hereinabove recited, Metropolis and Thompson have arranged for a cooperative use of their respective parcels, have provided for the operation, repair and maintenance of the building as a unit, and have acquired an interest in the net income of the building as a unit. The forfeiture of the Metropolis lease will unquestionably terminate such cooperative use and end the arrangement whereby Thompson possesses an interest in the income from the building as a unit.

As to the theatre sublease, we fail to see how Metropolis alone can forfeit this lease or claim its termination. There is but a single lease. Both Metropolis and Thompson succeed to the lessor's interest upon forfeiture of

the ground leases. It would certainly require the joint action of Metropolis and Thompson to declare the theatre sublease ended. But in any event, Thompson is equally interested with Metropolis in the operation of the theatre under this lease and the payment of rental thereunder. Even if Metropolis had the right to terminate this lease without the concurrent action of Thompson, certainly Thompson has such an interest in the lease as to make Thompson an indispensable party in a suit to declare the lease terminated.

The defendants here have assumed obligations under both the Metropolis and Thompson leases, as amended, and the theatre sublease. These obligations relate to the operation of the building as a unit, including the repair and maintenance thereof, and to an accounting for the net income of the building as a unit. Under the theatre sublease, the lessee has agreed to operate a theater located on both parcels and to pay a single rental. These obligations with respect to the building and the theatre run to Thompson as well as Metropolis. If this Court were to decree the termination of the ground lease and theatre lease, what would be defendants' status with respect to the Thompson lessors, who would not be bound by the decree? Such a decree would make it impossible for defendants to comply with their obligations to Thompson.

It is therefore evident that the interest of Thompson is so bound up with the interests of the other parties that the Court cannot in the absence of Thompson, render justice between the parties before it. A decree cannot be rendered without affecting the interest of Thompson. The interest of Thompson is not distinct and severable. In the absence of Thompson, a decree cannot be entered herein consistent with equity and good conscience. Each of the four questions enumerated in *Montfort* v. *Korte* (C. C. A. 7, 1938),

100 F. (2d) 615, *cert. denied* 306 U. S. 659, 59 S. Ct. 791, 83 L. Ed. 1056 (1939), hereinabove quoted (p. 12) must be answered in the negative. A negative answer to any one of these questions makes the absent party indispensable.

An interest in the income from property makes the possessor of such interest an indispensable party to a proceeding affecting such income. In *Keegan* v. *Humble Oil & Refining Co.* (C. C. A. 5, 1946), 155 F. (2d) 971, Keegan filed suit against Humble to recover an undivided interest in oil land, alleging that Humble was a trespasser. Humble had entered into agreements with Sperry and others for an overriding royalty on the oil produced. In dismissing the case because of the absence of indispensable parties, the court held, at page 973:

> "Their (Sperry, *et al.*) interest are so bound up with Humble Oil & Refining Co. that the relief prayed for in the bill divesting Humble of its leasehold would deprive them of their right to share in the oil produced."

The case of *Calcote* v. *Texas Pacific Coal & Oil Co.* (C. C. A. 5, 1946), 157 F. (2d) 216 (*cert. den.* 329 U. S. 782, 67 S. Ct. 205, 91 L. Ed. 671 (1946) *reh. denied* 329 U. S. 830, 67 S. Ct. 356, 91 L. Ed. 704), is also to the same effect. The lessors under an oil lease filed suit to cancel the lease. The lessors had agreed to pay an overriding royalty to certain persons not parties to the suit. These royalty grantees were not parties to the oil lease. The court ruled that the royalty grantees were indispensable parties.

Similarly, Thompson's interest in the preservation of the property also establishes the indispensability of Thompson. In *Calvert* v. *Bradley*, 57 U. S. (16 How.) 580, 14 L. Ed. 1066 (1853), the Court considered a situation where the lessee had covenanted with several lessors to keep the demised premises in repair, and where the lease set out

the proportions which the lessor owned and reserved the rent to them in those proportions. In answer to the contention that the covenant was not joint because its stipulations were with the several covenantees, severally and jointly, the Court held that all covenantees were interested in the preservation of the property demised. All lessors were held to be indispensable parties to the suit.

Other cases to the same effect are *Shields* v. *Barrow*, 58 U. S. (17 How.) 130, 15 L. Ed. 158 (1855), and *South Penn Oil Co.* v. *Miller*, (C. C. A. 4, 1909), 175 F. 729.

In the instant case, Thompson has acquired an interest in the income of both tracts as a unit, and Metropolis possesses a similar interest. Thompson, as well as Metropolis, has the right to have the gross income from the building as a unit applied to the operation, repair and maintenance of the building as a unit. Thompson and Metropolis have become privies to the theatre lease. These interests cannot be terminated by the court in the absence of Thompson.

Despite petitioner's assertions to the contrary, the federal rule is only declarative of the rule in force in Illinois.

IV.

The Illinois Law Requires That the Thompson Lessors Be Joined In a Suit Such as Is Here Brought by Petitioners to Forfeit Valuable Leases In Which the Thompson Lessors Have a Vital Interest.

(a) The Illinois rule provides that all persons possessing a substantial legal or beneficial interest in the subject matter of the litigation and who will be affected by the decree must be made parties to the suit.

In *Georgeoff* v. *Spencer* (1948), 400 Ill. 300, the Supreme Court of Illinois said at pages 302-3:

"From the facts appearing upon the face of the com-

plaint and counterclaim it is apparent that the assignees, representatives, or heirs of Joseph Spencer are persons who have an interest in the subject matter of the lawsuit. It also appears that God's Voice Spiritual Association, Inc., may have a beneficial interest of some sort. These are necessary and essential parties to the litigation. It has also been said that a necessary party is one who has such an interest in the matter in controversy that it cannot be determined without either affecting that interest or leaving the interest of those who are before the court in a situation that might be embarrassing and inconsistent with equity. *Commonwealth Trust Co. of Pittsburgh* v. *Smith*, 266 U. S. 152, 69 L. ed. 219.

"When omission of necessary parties is noted the ordinary procedure is for the court to stop further proceedings. (*Texas Co.* v. *Hollingsworth*, 375 Ill. 536; *McMechan* v. *Yenter*, 301 Ill. 508.) The chancellor erred in undertaking to pass upon the merits of the case when necessary parties to relief upon the complaint, as well as upon the counterclaim, were not before the court."

Language identical to this, but using the word "indispensable" as an alternative to the word "necessary", is found in *Stripe* v. *Yager* (1932), 348 Ill. 362.

See also *Texas Co.* v. *Hollingsworth* (1941), 375 Ill. 536, *Oglesby* v. *Springfield Marine Bank* (1944), 385 Ill. 414, and *Gaumer* v. *Snedeker* (1928), 330 Ill. 511.

This is the rule of law identical with that of the Court of Appeals for the Seventh Circuit, of the Court of Appeals for the Fifth Circuit, and of this Court.

Petitioner cites but two Illinois cases to establish the Illinois law which, it is claimed, would give petitioner the right to sue without joining the Thompson lessors.

The case of *Stevenson* v. *Bachrach* (1897), 170 Ill. 253, is not in point. The Illinois Partition Act 1947 Ill. Revised Statutes chap. 106, section 1, provides that when

land is held in joint tenancy, tenancy in common, or co-parcenary, any party interested may compel a partition thereof by bill in chancery. The court held that the statute does not apply to separate owners of adjoining parcels of land improved with a common building, because the ownership was not that of joint tenants, tenants in common, or co-parcenors. That case did not involve the point of necessary parties, since the owners of both parcels were parties to the case. The instant case is not a partition suit and the *Stevenson* decision is not applicable.

The case of *McConnel* v. *Kibbe* (1867), 43 Ill. 12, is also a partition suit and is identical with the *Stevenson* case.

The cases and statutes which plaintiff cites having to do with ejectment are not here in point. Petitioner insists upon confusing the right to recover with the equitable relief demanded and its effect upon a vital right of the Thompson lessors.

V.

In Determining the Question of Indispensability of Parties, the Principal Purpose of the Suit and the Primary and Controlling Matter in Dispute Govern. In the Instant Case, the Primary and Controlling Matter Is the Forfeiture of the Leases. All Other Relief Is Dependent Upon and Incidental to This Primary Controversy.

Petitioner has argued at Points III, IV and V (Petitioner's brief, Pages 26, 29 and 32) as if the existence of a damage claim were sufficient to remove the indispensability of the Thompson lessors. As a matter of fact, no damage claim is involved in the instant action. What petitioner incorrectly refers to as a damage claim is instead a claim for an accounting, which is only ancillary to the main prayer for relief. The primary and controlling matter in the suit as far as either petitioner, or the Thompson

lessors, are concerned, is the forfeiture of the ground lease and the theatre lease.

If the Court refuses to declare such forfeiture, all other relief must likewise be denied. Petitioner's claim for an accounting is conditioned upon the Court's determination that the ground lease and theatre lease have been terminated. If the Court determines that petitioner cannot terminate these leases, petitioner's claim for an accounting of the profits has no basis. Petitioner will then be limited to the rentals specified in the ground lease, which have been tendered and refused. The accounting is merely incidental to the dominant controversy.

The complaint here is much more than a complaint in ejectment and for damages. It seeks a decree cancelling the Metropolis lease and the theatre sublease, directing the surrender of the demised premises to petitioner, enjoining the defendants from interfering therewith, and removing the various leases as clouds on petitioner's title.

Here again the prayer for possession is incidental to the dominant controversy—the forfeiture of the leases. Petitioner's right to possession is conditioned upon the forfeiture of the leases. If the court refuses to decree a forfeiture of the leases, then petitioner's claim to possession falls.

It is immaterial that Thompson would not be entitled to the same relief in every respect as Metropolis. As stated in *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 69, 86 L. ed. 47, 50 (1941):

> "Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary 'collision of interests' * * * exists, is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit' * * * and the 'primary and controlling matter in dispute * * *.'"

In that case, a mortgage trustee sued the mortgagor and others to establish the validity of a lease and to collect interest on the mortgage bonds. The mortgagor, who was liable for the interest, was aligned by the court on the same side as the mortgagee, because the primary and controlling matter in dispute was the validity of the lease which the mortgagee and mortgagor both affirmed and the other parties denied.

Petitioner relies upon the doctrine of *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, 82 L. ed. 1188 (1938). The case holds that the federal courts are bound to apply the substantive law of the states. This, however, has no application to the question of the jurisdiction of the federal courts, which is determined entirely by federal statute.

The alignment of the Thompson lessor with plaintiff in this case is not challenged. Petitioner does not question the decision of the Court of Appeals that petitioner and Thompson should be aligned on the same side.

Conclusion.

For the reasons and arguments set forth above, it is respectfully submitted that this court should deny the petition for certiorari heretofore filed herein.

Respectfully submitted,

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